77-1437

Supreme Court, U. S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

PHILIP PELTZ,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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PRELIMINARY STATEMENT

The within brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered on December 8, 1977, which struck petitioner's name from the roll of attorneys of the State of New York.

STATEMENT OF THE CASE

On January 9, 1970, in the United

States District Court for the Southern District of New York, petitioner was convicted of unlawfully, willfully and knowingly using means of interstate commerce and the mails and the New York Stock Exchange, in employing a device, scheme and artifice to defraud and making untrue statements of material facts in connection with the sale of certain common stocks (counts 3 and 4) in violation of U.S. Code, Title 15, Sections 78j(b) and 78ff(a) and Title 18, Section 2; unlawfully, willfully and knowingly using means of interstate commerce, of the mails and the New York Stock Exchange to effect short sales of certain securities in contravention of Securities Exchange Commission regulations (count 5) in violation of U.S. Code, Title 15, Section 78j(a) and 78ff(a) and Title 18, Section 2 and conspiracy so to defraud the United States (count one) U.S. Code, Title 18, Section

371. The petitioner was sentenced on January 9, 1970, to concurrent terms of one year on each of the counts 1, 3, 4 and 5; three months of which were to be served in a jail-type institution with the remainder of the sentence to be suspended, provided that a one year probation period would commence upon the expiration of confinement.

Petitioner's judgment of conviction was subsequently affirmed by the United States Circuit Court of Appeals for the Second Circuit (433 F.2d 48); certiorari was denied by this Court on March 8, 1971 (401 U.S. 955).

Respondent Committee's[1] first notice of respondent's 1970 conviction came

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[1]The respondent Committee only came into existence in November, 1974, with the promulgation of Part 691 of the Rules of the Appellate Division, Second Judicial Department.

in February, 1975, with the receipt of a letter from petitioner's co-defendant, Murray Weiner, addressed to the Appellate Division, First Department, which letter was forwarded by the Committee on Grievances of the Association of the Bar of the City of New York.[2] The respondent Committee then promptly reported the conviction to the Appellate Division, which in April, 1975, based upon then existing law, authorized respondent to institute a proceeding based upon petitioner's conviction. Knowing that the transcript and exhibits of petitioner's Federal trial would be

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[2]The Association of the Bar learned of petitioner's conviction in May, 1972, from Assistant United States Attorney David Brodsky--petitioner, who then maintained a law office in Bronx County was, of course, convicted in Manhattan. The Association of the Bar, which, it would seem, intended to withhold action pending petitioner's testimony in the Fall, 1972 trial of Murray Weiner, apparently lost track of the matter until receipt of Weiner's 1975 letter.

needed as evidence in the disciplinary proceeding, respondent attempted to obtain same from the United States Attorney's office. Much difficulty was encountered; the Assistant United States Attorney familiar with the case had left the office, the United States Attorney had moved to new quarters at St. Andrews Plaza, the files relating to petitioner's case had been placed in storage and took literally months to locate.

As a result, petitioner's petition was not served until July, 1976. Petitioner filed an answer thereto and the Appellate Division, by order dated September 17, 1976, referred the issues raised by the disciplinary petition and the answer to the Hon. Arthur S. Hirsch. Thereafter, by a further order, dated October 20, 1976, Hon. Arthur S. Hirsch was relieved of such designation and the said issues were referred to the Hon. Simon J.

Liebowitz, a Retired Justice of the Supreme Court, as Referee, to hear and to report, together with his findings on the said issues. The Hon. Simon J. Liebowitz held a hearing and filed his report with the Appellate Division on July 1, 1977, together with a transcript of the hearing and the exhibits. The respondent moved, by a notice of motion dated July 11, 1977, to confirm the said Referee's report, and the petitioner submitted an affirmation in support of the respondent's said motion. The Appellate Division held the said motion in abeyance and the respondent moved by a notice of motion dated August 26, 1977, for leave to serve and file a supplemental petition therein, and to refer the issues raised by the supplemental petition to a referee to hear and to report thereon. The Appellate Division, by an order dated September 9, 1977, granted the said motion insofar as it was for leave to

serve and file the supplemental petition, and upon the service and filing of the petitioner's answer, the Court on October 7, 1977, referred the matter to Hon. Harry Gittleson, a retired Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues raised by the supplemental petition and answer.

On October 13, 1977, the New York Court of Appeals rendered a decision in Matter of Chu, 42 NY2d 490, a case concerning an attorney convicted of a Federal felony. The Court of Appeals held, among other things, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment."

By notice of motion dated October 20, 1977, the respondent moved in the Ap-

pellate Division to vacate the order of October 7, 1977 (referring the issues raised by the supplemental petition and answer), and to strike petitioner's name from the roll of attorneys based upon the grounds that petitioner was automatically disbarred based upon a felony conviction.[3] As above noted, on December 8, 1977, the Appellate Division granted said motion and struck petitioner's name from the roll of attorneys (Matter of Peltz, 60 AD2d 587). Petitioner filed his notice of appeal dated December 15, 1977, and alternatively sought leave to appeal to the Court of Appeals from said order and on January 18, 1978, the Court of Appeals dismissed the appeal and denied leave (supra, 43 NY2d 646, 844).

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[3]Petitioner's crimes were felonies under Federal Law, although not cognizable as such under New York law.

POINT ONE

RETROSPECTIVE APPLICATION OF THE NEW YORK COURT OF APPEALS' DECISION IN MATTER OF CHU, 42 NY2d 490, DOES NOT CONSTITUTE AN EX POST FACTO LAW AND BILL OF ATTAINER

New York Judiciary Law Section 90, subdivision 4, provides as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pur-

suant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in Matter of Donegan (283 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'"(supra at 292).

On October 13, 1977, the New York Court of Appeals modified the Donegan ruling in Matter of Chu, stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been

> the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when Donegan was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493).

Since the disciplinary proceeding predicated upon petitioner's conviction was not finally judicated at the time of the Court of Appeals decision in Chu, that ruling was held to apply to petitioner and his name was stricken from the roll of attorneys.

Petitioner's contention, that the application of the Chu ruling to him constitutes an ex post facto law and bill of attainer, is wholly without merit.

An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to ex post facto laws has long been held by this Court to apply solely to criminal statutes (Baltimore & S.R. Co. v. Nesbit, 51 U.S. 395, see also, Mahler v. Eby, 264 U.S. 32) and for this reason, petitioner's reliance on Bouie v. City of Columbia (378 U.S. 347) is unfounded.[4] The Supreme Court's decision in the Bouie case was based upon a determination that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which

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[4]Disciplinary proceedings have consistently been held to be civil in nature (Matter of Zuckerman, 20 NY2d 430, 438 [1967]), cert. den. 390 U.S. 925 [1968], and are not considered to be criminal (Matter of Unger, 27 AD2d 925 [1st Dept. mem. 1967], cert den. 389 U.S. 1007 [1967]).

had been expressed prior to the conduct in issue,' it must not be given retroactive effect" (supra at 354). The case at bar is neither a criminal one nor was the decision in Chu either "unexpected" or "indefensible." Judiciary Law, Section 90, has not changed, only the interpretation thereof vis a vis Matter of Donegan (supra) has changed, and for this reason petitioner's reliance on Matter of Garland (71 U.S. 333) is unfounded.

Moreover, petitioner's reliance on Matter of Ruffalo (390 U.S. 544) is clearly misplaced.[5] No new charges were lodged against petitioner as a result of the Chu decision; in fact, the net effect of Chu was that petitioner was not the subject of

[5]It should be noted that despite the reversal of Ruffalo's disbarment in the Federal Court, his State Court disbarment, which was the predicate for the Federal proceeding, was unaffected by the Supreme Court's decision (supra at 552).

any professional misconduct charge, but rather ceased to be an attorney by operation of law; the notice requirements of Ruffalo obviously do not apply.

Petitioner's argument that the Chu ruling should not be applied retroactively in petitioner's case further ignores the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (People v. Morales, 37 NY2d 262). In the Morales case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great

> Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See United States v. Schooner Peggy, 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in Mullany v. Wilbur, 421 U.S. 684 (see People v. Davis, 49 AD2d 437) and Morrissey v. Brewer, 408 U.S. 471 (see People Ex Rel Gambino v. Warden, 43 AD2d 400) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in Linkletter v. Walker, 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy,

supra..." and "...no distinction (is) drawn between civil and criminal litigation..." (supra at 627).

POINT TWO

DELAY IN THE COMMENCEMENT OF DISCIPLINARY PROCEEDINGS AGAINST PETITIONER DOES NOT CONSTITUTE A VIOLATION OF PROCEDURAL DUE PROCESS

The constitutional right to a "speedy trial" applies only to criminal cases and then comes into play only after a person has been accused of a crime, i.e., when an indictment is returned (United States v. Marion, 404 U.S. 307).

As recently as April 5, 1977, the New York Court of Appeals confirmed the civil nature of these proceedings:

> "Disciplinary proceedings against an attorney for professional misconduct have consistently been held not to be criminal proceedings but rather are those which serve to protect the court and society from the practice of law by persons who fail to maintain the

necessary standards of integrity and probity." (Matter of Anonymous Attorneys, 41 NY2d 506, 509.)

The Court of Appeals in Anonymous further reaffirmed the words of Judge Cardozo that:

> "Membership in the bar is a privilege burdened with conditions.... To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime" (Matter of Rouss, 221 N.Y. 81, 84-5).

Petitioner argues that the lapse of several years between the date of his conviction and the institution of disciplinary proceedings predicated thereon constitutes a denial of a "speedy trial." As noted above and as found by the Appellate Division's referee, the delay "is not due to dereliction of the Grievance Committee," thus resulting in the rejection of petitioner's "laches" argument in the Courts below.[6]

[6]The essential element of the equitable defense of laches is delay prejudicial to the opposing party (In re Barabash's Estate, 31 NY2d 76, 81), and the doctrine of laches will not apply unless the delay has occasioned some prejudice (Matter of Huey, 42 AD2d 1028, 1029). Petitioner was not prejudiced by the delay in the institution of the disciplinary proceeding; he continued to practice law unfettered by his criminal conviction.

The defendant in Marion contended that his right to a "speedy trial" was violated because of the lapse of three years between the end of the criminal scheme and the return of the indictment; as here, the filing of charges. Even assuming, arguendo, that the speedy trial right was relevant to attorney disciplinary proceedings--which it is not--that right affords no protection to one who is not yet an accused:

> "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any

> particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him. [T]he essential ingredient is orderly expedition and not mere speed." (Supra at 313.)

Moreover, the Supreme Court, holding in Marion that the trial court dismissed the indictment on "speedy trial" grounds in error, noted "No opinions of this Court intimate support for appellees' thesis, and the courts of appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision, where only pre-indictment delay was involved" (emphasis added, supra at 315).

The New York Courts have further recognized that there is no statute of limitations preventing the Appellate Division

from taking cognizance of the unprofessional conduct of an attorney (In re Phillies, 17 AD2d 93, 100, lv. to app. den. 12 NY2d 645).

Lastly, petitioner himself is at least in part to blame for that fact that he fell within the ambit of the Chu decision. Subsequent to the receipt of the referee's report in July, 1977, the respondent Committee promptly moved to confirm same and had it not been for petitioner's "activities" in August, 1977--"activities" which the Appellate Division found to warrant filing of a supplemental petition and necessitating further hearings--petitioner's matter presumably would have been finally adjudicated and not subject to the Chu decision.

Although, by reason of the intervening decision in Chu, the Appellate Division never determined the merits of peti-

tioner's August, 1977 "activities," suffice it to say, petitioner is himself responsible, at least in part for his present predicament vis a vis Matter of Chu.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, N.Y.
May 9, 1978

Respectfully submitted,

NICHOLAS C. COOPER
Attorney for Respondent